ALEXANDER L. STEVAS
CLERK

No. 80-1367

In the Supreme Court of the United States

OCTOBER TERM, 1980

LINUS J. NIEDERMEYER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Oregon, respectfully prays that this Court deny petitioner Niedermeyer's Petition for Writ of Certiorari which seeks review of the decision of the Oregon Court of Appeals in *State v. Niedermeyer,* 48 Or. App. 665, 617 P2d 911, S. Ct. *rev denied,* 290 Or. 249 (1980).

QUESTION PRESENTED

Respondent submits that the question presented by this case is more accurately stated as follows:

Whether the Oregon Court of Appeals properly concluded that the State of Oregon had not violated the petitioner's rights under the Fourth and Four-

teenth Amendments to the United States Constitution when police officers, who had probable cause to believe that the petitioner had committed a vehicular crime within the previous 75 minutes and who had taken up surveillance of the petitioner's home, made a warrantless entry into the petitioner's house through an open door and a warrantless arrest of the petitioner, immediately after he had arrived at home in his car, failed to heed an officer's call to stop, and run from his car and into his house?

STATEMENT OF THE CASE

Respondent submits that the petitioner's summary of the facts under his statement of the case is inaccurate and incomplete. The facts were correctly summarized by the Oregon Court of Appeals. That summary appears in the Appendix to the Petition at App-3-7.

The petitioner's summary of the facts is incorrect when it states: "No identification was made of the driver" and "there is no evidence on the record that the defendant knew he was being hailed by a police officer". (Pet. 5, 6). The Court of Appeals' summary of the facts correctly recites that the state police officer who had initially attempted to conduct a traffic stop of the petitioner's vehicle, had shined his flashlight on the petitioner's face before the petitioner sped off and had called in a report of the incident, a description of the

driver, and the license number of the petitioner's vehicle. (Pet. App. 4). After the petitioner's arrest at his home by municipal police officers, the eluded state patrolman identified the petitioner's car as the vehicle which had eluded him and the petitioner as the driver of the car. (Pet. App. 6-7). The record in this case also indicates that the municipal officer who arrested the petitioner was in uniform and had approached the petitioner's house in a marked police vehicle before he hailed the petitioner to stop as the petitioner ran from his car into his house. (Tape CT A46,401 2A, Cue No. 11 at 305.

RESPONSE TO PETITIONER'S ARGUMENT IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI

The Oregon Court of Appeals concluded that the arresting officers' warrantless entry into the petitioner's home and warrantless seizure of the petitioner were constitutionally justified by the exigent circumstance of "hot pursuit". (Pet. App. 8-9). The Oregon appellate court's resolution of this issue is not in conflict with applicable decisions of this Court or the decisions of other state appellate courts and the federal courts of appeal.

A. *The Oregon Court of Appeals Decision is Consistent With This Court's Interpretations of the Fourth and Fourteenth Amendments.*

In this case, the car driven by a man eventually

identified as the petitioner eluded a state police patrol unit. The state police had probable cause to believe the driver of the vehicle had violated ORS 487.555, a Class A misdemeanor and a major traffic offense under Oregon law. ORS 487.555(2), 487.530(4), 484.010(5)(e) [set forth in Petition at 2-4]. The municipal officers who received a broadcasted report of the eluding incident, a description of the suspect vehicle, and its license number had probable cause to believe the driver of the vehicle had committed a major traffic offense when they set up surveillance of a residence which was linked by vehicle registration records to the suspect auto. When the municipal officers saw the petitioner drive the suspect vehicle into the driveway of his residence, within 75 minutes of the occurrence of the reported crime, they were authorized by Oregon law to arrest the petitioner without a warrant. ORS 133.310(1)(a);[1] ORS 484.100(1) [set forth in Petition at 4]. When the defendant failed to heed the municipal officer's call to stop and ran into his house, the police were authorized by ORS 133.235(5)[2] [set forth in Peti-

[1] ORS 133.310(1)(a) provides:

"(1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed:

"(a) A felony, a Class A misdemeanor, an unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class A misdemeanor, or a major traffic offense as defined in subsection (5) of ORS 484.010; . . ."

[2] ORS 133.235(5) provides:

"(5) In order to make an arrest, a police officer may enter premises in which he has probable cause to believe the person to be arrested to be present."

tion at 4], as interpreted by the Oregon Supreme Court, to enter the defendant's home to make an arrest.

Prior to trial in this case and the decision of this Court in *Payton/Riddick v. New York,* 445 U.S. 573, (1980), the Oregon Supreme Court interpreted ORS 133.235(5) as authorizing warrantless entries of residences to make probable cause arrests only in situations involving exigent circumstances. *State v. Olsen,* 287 Or. 157, 164-165, 598 P.2d 670 (1979).[3] The Oregon Supreme Court's interpretation of the requirements of the Fourth and Fourteenth Amendments, in the context of warrantless entries into residences for arrest purposes, is consistent with this Court's holding in *Payton/Riddick v. New York, supra,* that absent exigent circumstances, the police may not enter a house to make an arrest without a warrant. 445 U.S. at ——, 63 L.Ed.2d at 653. The Oregon Court of Appeals decision in this case is consistent with these decisions because the court based its constitutional conclusion upon its determination that the warrantless entry here was justified by exigent circumstances.

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[3] In *State v. Olsen, supra,* the Oregon Supreme said:

"It is our conclusion that the words of both the Oregon and United States Constitutions dictate that where exigent circumstances which militate against securing the warrants do not exist, probable cause to arrest does not justify a forced entry into the home of the suspect. Such probable cause justifies only the issuance of a warrant. For this reason the application of ORS 133.235(5) would be an unconstitutional application where there are no exigent circumstances."

Specifically, the Oregon appellate court recognized that the petitioner's case fell within the "hot pursuit" exception to the warrant requirement of the Fourth Amendment. This exception was specifically recognized and labeled by this Court in *United States v. Santana,* 427 U.S. 38 (1976). In that case, the police encountered a criminal suspect standing in her doorway when they arrived to arrest her for a narcotics offense. This Court held that the defendant could not thwart an otherwise proper warrantless arrest in a public place, *United States v. Watson,* 423 U.S. 411 (1976), by retreating into her house. Police entry into the vestibule of the home was justified by the exigent circumstance of "hot pursuit", even though the chase in that case ended almost as soon as it began. *United States v. Santana, supra,* 427 U.S. at 42-43.

The doctrine of "hot pursuit" had been developed but not labeled in *Warden v. Hayden,* 387 U.S 294 (1967). Civilian witnesses had followed an armed robber from a crime scene to a residence. Officers summoned to the house entered without a warrant, arrested the suspect, and searched rooms and compartments while looking for other persons and a gun. The entry, arrest, and search were sustained by this Court. It concluded that speed was essential to ensure that police had control of the robber and all weapons which could be used to effect an escape. *Id.* at 298-299. The

constitutional ruling by the Oregon Court of Appeals in this case is entirely consistent with the holdings of this Court in *Santana* and *Hayden.*

The petitioner attempts to distinguish his case from *Santana* and *Hayden* on the basis of its facts. He mistakenly states that there was no evidence in the record of this case that he had any knowledge that he was being hailed by a police officer. In fact, the officer who hailed the petitioner was in uniform and standing by a marked police vehicle. The petitioner points to the fact that he was wanted in connection with a misdemeanor whereas the suspects in *Santana* and *Hayden* were felons. He overlooks the fact that he was wanted for a crime, which for purposes of arrest, has been equated by the Oregon Legislature with a felony. His crime of Eluding a Police Officer is a serious offense and one which necessarily requires a prompt official response. Contrary to the petitioner's contention, the ruling of the Court of Appeals in this case does not allow a warrantless entry upon probable cause, absent exigent circumstances.

B. *The Oregon Court of Appeals' Resolution of the Constitutional Issue in This Case is Consistent With the Decisions of Other State Courts of Last Resort and Federal Courts of Appeal.*

The Oregon Court of Appeals decision in the petitioner's case is not in conflict with the federal and state court decisions he cites in his petition. The ar-

resting officers here had probable cause to believe the defendant had committed a crime of fleeing and eluding a police officer. When he ran into his home to avoid arrest on such a charge, the police had every reason to believe he would continue to attempt to elude them. Their concern that immediate action was necessary in order to prevent an escape was reasonable. The decision in this case is in line, rather than at odds, with the federal authorities cited by the petitioner.

Nor is the decision in this case inconsistent with the state court authorities cited by the petitioner. The "hot pursuit" principal recognized by the state court in this case has been applied by other state appellate courts in cases strikingly similar to the case at bar. In *State v. Penas,* 200 Neb. 387, 263 N.W.2d 835, 837 (1978), a drunk driving defendant attempted to avoid arrest by driving to his home, ignoring an officer's call to stop, and running through a side doorway to his house. The officer stood in the doorway, waited for cover, and arrested the defendant in the vestibule when he suddenly appeared on the stairs. Relying on *Santana,* the Nebraska court held the warrantless entry to arrest was justified by the exigent circumstance of "hot pursuit" of an offender who was attempting to evade contact with police.

In *People v. Escudero,* 23 Cal.3d 800, 153 Cal. Rptr. 825, 592 P.2d 312 (1979), the California Supreme

Court upheld a warrantless entry of a residence to arrest as "hot pursuit" even though, as in this case, an hour elapsed between initial siting of the defendant and his eventual arrest. That court, which had previously held that warrants were generally required in residential arrest situations, *People v. Ramey,* 16 Cal.3d 263, 127 Cal. Rptr. 629, 545 P.2d 133 (1976, concluded that it was not necessary that the defendant be kept in view at all times for the "hot pursuit" principal to apply. *Id.* 592 P.2d at 318.

The pertinent authorities from other jurisdictions would have required the result reached by the Oregon Court of Appeals in this case.

CONCLUSION

Respondent, the State of Oregon, respectfully submits that the Oregon Court of Appeals correctly decided a question of federal constitutional law in a manner consistent with the decisions of this Court and other state and federal courts. This Court has recently spoken to the issues presented in this case in *United States v. Santana, supra,* and *Payton/Riddick v. New York, supra.* This petition presents no new substantial question of federal constitutional law. Allowance of the petition would be improvident. Respondent respectfully prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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